
Kluwer Mediation Blog

Two Toronto Mediations

Rick Weiler (Weiler ADR Inc.) · Wednesday, August 22nd, 2012

“Thank God for the last minute; otherwise nothing would ever happen.”

This old saying rolls through my mind as I sit to type this on my iPad in the departures lounge at Toronto’s [Billy Bishop Airport](#) located on the island just opposite the heart of this great city. My blog post is due at midnight

These days about 70% of my commercial mediation practice is in the greater Toronto area, and this entails a regular one hour flight from my home in Ottawa. [Porter Airlines](#) has greatly improved my quality of life during its five-year existence by allowing me to avoid the inconveniences associated with flying into [Toronto’s Pearson Airport](#).

Today’s mediation centered around a car accident occurring about 5 years ago. This was a so-called “global” mediation because we were attempting to settle three separate law suits (claims for tort, no-fault accident benefits and contractual long-term disability insurance, respectively). In effect, we were attempting to mediate three cases simultaneously.

These global mediations often make sense given that each case arises out of the same accident, and the main issue revolves around the medical condition of the plaintiff. It also makes sense, at least at first blush, given the provisions of the [Ontario Insurance Act](#) which are designed to prevent double recovery by plaintiffs through a system of credits or offsets available to tort, accident benefits and LTD defendants. I say at first blush because some interesting (some would call it bizarre) case law has emerged around how these offsets are supposed to work in the case of lump sum settlements.

In my experience the multiple cases can often be successfully mediated, particularly when the trial is fast approaching and parties are motivated to avoid the uncertainty trials always entail.

Sometimes, though, from a mediator’s perspective, these global mediations make less sense, given the very different legal and factual issues involved in each action. In today’s matter there were significant disputes on a number of important issues and the trial is still at least two years off. I was having concerns about “ripeness” for settlement very early on but took heart from [my previous post](#) about not giving up too soon.

As it turned out we went all day and ended up with a settlement on the LTD case but not on the other two. Still, everyone left much clearer on what the challenges preventing settlement are and having a pretty good idea of what the true “hard gap” is between the parties.

Yesterday's case, my first after a lengthy summer vacation, was a completely different kettle of fish. A troubled mining joint venture that had previously gone off the track leading to litigation and a courtroom settlement, was floundering again. In this case emotions were running as high as trust levels were low. We experienced two or three choruses of "That's it! We're leaving!" before lunch.

The mediator's strategy is much different in a commercial case where there is an attempt to reestablish an ongoing relationship than in insurance disputes where the goal is to negotiate to a mutually acceptable (or, more often, unacceptable number). So yesterday, notwithstanding a 10 year history of disappointment, mistrust, frustration and litigation I spent a lot more time in joint session, caucusing only when the temperature needle was trending well into the red zone. This approach requires much more "active listening" from the mediator and constant reframing. For example, one party's exclamation that he simply can't trust that other s.o.b. leads the reframing mediator to suggest maybe we should move the focus from the "hot button" trust issue to the real concern which is how to encourage and secure compliance with the promises being made in this negotiation.

The result late yesterday afternoon was a settlement agreement addressing all presently outstanding issues – with the proviso that any future disputes (and no one has any illusions there will be none) are to be dealt with by a precisely defined multi-step dispute resolution process (i.e. negotiation, mediation, arbitration).

So, two days back and these two very different and interesting cases remind me yet again of why it is I love this work and how privileged I am to be able to do it.

Perfect timing. They've just called my flight.

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